92-827

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1992, Term

RAYMOND H. COPP, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

(1) Did the First Circuit fail to consider the decisions of other Circuit Courts and the United States Supreme Court in limiting the Taxpayer's right to an evidentiary hearing where the Revenue Agent has submitted an affidavit in support of summary enforcement, and the taxpayer has alleged improper purpose for issuance of a third party summons?

B. LIST OF ALL PARTIES TO THE PROCEEDING

(1) Raymond H. Copp, Jr., Petitioner

(2) United States of America, Respondent

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D. OFFICIAL REPORT

Official Report of the First Circuit's Decision can be found at Raymond H. Copp, Jr. v. United States, 968 F.2d 1435 (1st Cir., 1992). The decision of the lower court is not reported but may be found at Appendix A-60.

E. JURISDICTIONAL GROUNDS

(i) Date of Entry of Judgment July 14, 1992.

(ii) No request for a rehearing was made by Petitioner, and no extension of time was granted for filing this Petition for Certiorari.

(iii) This is not a cross petition for Certiorari and SCR 12.3 is not applicable.

(iv) The statutory provision

conferring jurisdiction on this Court to review the judgment of the First Circuit is 28 U.S.C. 1254(1)

F. STATUTORY PROVISIONS

26 U.S.C. 7602 (1986)

G. STATEMENT OF THE CASE

The Taxpayer/Petitioner Raymond H. Copp, Jr. (hereinafter "the Taxpayer") is an individual who resides in Meredith, New Hampshire (A-2).[1] The Internal Revenue Service (hereinafter "the I.R.S.") through Revenue Agent Ernest Van Loan is conducting an examination of the income tax liabilities of the Taxpayer (Van Loan Declaration A-53-59). The I.R.S.

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[1] "A" references are to Appellant's separately bound record appendix.

previously issued an administrative summons on Goldman Sachs & Co. (hereinafter "Goldman") concerning the Taxpayer on January 14, 1991 (A-1). At the time the original summons was issued, only tax year 1988 was under audit by the IRS (A-3). On January 30, 1991, the Taxpayer filed a Petition to Quash that summons in the Southern District of New York (A-1). The case was docketed for expedited hearing on March 12, 1991 (A-1). Prior to the scheduled hearing date and at the request of Assistant U.S. Attorney Stephen Froot, who believed the original summons was overbroad, the I.R.S. withdrew the original summons (A-1).

On or about March 4, 1991, the Taxpayer's counsel received a document request for production of documents for tax years 1985-1989 (A-90). Taxpayer's

counsel offered to produce on an expedited basis all requested documents for the two open years, 1987 and 1989 but told Revenue Officer Van Loan that the documents for the closed years were not readily available (A-91). However, the IRS insisted on production for all years within a two week period or it would issue a summons (A-92).

On or about April 5, 1991, the I.R.S. issued a second summons to Goldman (A-1). The summons required production by Goldman on May 8, 1991 of records of the Taxpayer for the tax periods 1985-1989 (A-1).

In the Taxpayer's Petition to Quash the I.R.S. summons of April 5, 1991, the Taxpayer alleged that the summons should be quashed on the following grounds: (1) it was overly broad (A-11, ¶¶ 14-15); (2) it was issued for an improper purpose (A-6-11); (3) it should have been served on

the New York office of Goldman Sachs & Co. (A-7-8,) ¶ 9, 10); (4) the Internal Revenue Service issued the summons after it had referred the matter to the Department of Justice to investigate Taxpayer's potential criminal liability (A-10) ¶ 12); and (5) the information is not relevant to tax years other than 1988, to which the civil audit "has largely been limited" (A-10-13 ¶¶ 13, 16).

On June 21, 1991, the Respondent/Appellee United States of America (hereinafter "the Government") filed a response to the Motion to Quash (A-17-25).

On July 12, 1991, the Government moved for a protective order in response to the set of interrogatories served by the Taxpayer with the U.S.A. (A-26-27). That motion was referred to Magistrate Cohen who on August 7, 1991 granted the

Government's request for a Protective Order (Order found at A-28-31).

On August 21, 1991, the Taxpayer filed a Motion to Reconsider Magistrate Cohen's ruling of August 7, 1991 (A-32). The basis for said Motion was to allow Magistrate Cohen an opportunity to consider the decision of Judge Stahl of the United States District Court of New Hampshire dated August 7, 1991 in the companion case involving the Taxpayer and eight other third parties wherein Judge Stahl had determined that the "sole criminal purpose" test of United States v. LaSalle, 437 U.S. 298 (1978), had survived TEFRA 26 U.S.C. § 7602(b), and (c) (2) (A-32-35) (Judge Stahl's decision can be found at A-66-78).

On September 25, 1991, the Government filed a motion for summary enforcement of

the summons (A-37-52).

In support of its motion, the Government submitted a declaration of Revenue Agent Van Loan, in which he stated that he is conducting an examination to determine Taxpayer's correct federal income tax liability for the taxable years 1985 through 1989; that the information sought pursuant to the summons would assist in the determination of Taxpayer's tax liability for those years; that, with the exception of one document turned over by Taxpayer, the requested information was not already in the possession of the Government; and that all procedures required by the Internal Revenue Code had been followed with respect to this summons. (A-53 Van Loan Declaration). Revenue Agent Van Loan also declared that "there is no 'Justice Department'

referral, as that term is described in 26 U.S.C. § 7602(c) (1982), in effect with respect to the Taxpayer for any of the taxable years 1985 through 1989." (A-54 Van Loan Declaration, ¶ 4).

On November 27, 1991, the District Court without a hearing granted the Government's motion for summary enforcement (A-60). Judge Mazzone handwrote on the first page of the Government's Motion the following:

> "On the basis of the uncontroverted [Revenue Agent] Van Loan affidavit, there is no criminal referral, the summons was issued in good faith to make a correct determination of the [Taxpayer's] federal income tax liabilities, if any, for the taxable years under investigation, and all of the required procedures of the Internal Revenue Code have been followed (A-61)."

The enforcement order required Goldman Sachs & Co. to appear, to testify,

and to produce the documents demanded by the summons on December 13, 1991 (A-62-64).

On December 6, 1991, the Taxpayer filed a motion for reconsideration and/or to alter or amend the enforcement order (A-84-88). The grounds for that motion were primarily that the United States District Court for the District of New Hampshire, which was considering Taxpayer's motion to quash eight additional summonses issued to different third parties for the years at issue, held that Taxpayer was entitled to an evidentiary hearing at which he could examine Revenue Agent Van Loan. (See December 3, 1991, Order of the District Court for the District of New Hampshire, (A-79). That Court ordered the hearing because it held that the "sole criminal

purpose" defense survived the 1982 amendments to 26 U.S.C. § 7602, passed as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), and it found that the Taxpayer in that case had made a "sufficient showing" to pursue said "sole criminal purpose" defense (A-82).

On December 18, 1991, the District Court denied without opinion Taxpayer's motion for reconsideration and/or to alter and amend the judgment and his motion for a stay pending appeal.

On December 23, 1991, the Taxpayer filed a notice of appeal "from the enforcement order and judgment dated on the 27th day of November, 1991... and from the denial of the Motion for Reconsideration on December 18, 1991..." (A-95).

On July 14, 1992, the First Circuit affirmed the decision of the District Court.

H. STATE COURT REVIEW INAPPLICABLE

This is not a review of a State Court Action.

I. BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the first instance is 26 U.S.C. § 7609 (h).

J. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The First Circuit erred in failing to reaffirm its earlier decision in United States v. Freedom Church, 613 F.2d 316 (1st Cir., 1975) and to rule in accordance with other circuit courts which have allowed taxpayers the right to an evidentiary hearing in an I.R.S. summons

proceeding where "a minimum threshold" of evidence has been presented by the Taxpayer to the Trial Court.

By order dated November 27, 1991 (A-61), Judge Mazzone summarily enforced the I.R.S. administrative summons which the Taxpayer had moved to quash on the basis of it being overly broad, issued for an improper purpose, brought in the wrong forum, and issued subsequent to a criminal referral (A-1-15). In his order, Judge Mazzone did not discuss Taxpayer's request for an evidentiary hearing to examine the revenue agent. (Petition ¶ 17, A-14). Prior to Judge Mazzone's order, Magistrate Cohen had granted the Government a protective order for interrogatories submitted by the Taxpayer (A-28-31). As part of the Opposition to the I.R.S. motion for summary enforcement, counsel

for Taxpayer submitted the identical affidavit earlier filed in the New Hampshire case (A-89-94). That affidavit averred facts which taken together reflect upon the good faith purpose and the commitment to seek criminal prosecution, to wit: that the Justice Department originally sought production in New York; that after the action was set for hearing, the summons was voluntarily withdrawn; that the audit was expanded to include closed years and that the service made a rapid push for production (A-89-94).

Judge Stahl of the District Court of New Hampshire did grant an evidentiary hearing to the Taxpayer in the parallel case, Raymond H. Copp, Jr. v. United States of America, Civ. No. 91-069-S, U.S.D.C. of N.H. (1991) (A-79-83). In the New Hampshire action, the Taxpayer had

filed the same interrogatories, counsel's affidavit, and requested an evidentiary hearing to examine the revenue agent as well. Judge Stahl found that the Taxpayer had followed the requisite procedure:

> Where, as here, Petitioner has made a sufficient showing to pursue a "sole criminal purpose" defense, the Court should 'proceed directly to a hearing at which, if desired, the summonee could examine the agent who issued the summons concerning his purpose. Here it could then, by observation and where necessary, its own questioning of the agent, make its own determination of whether exploration, as by discovery, seemed to be in order.
>
> United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970) (citations omitted); see also United States v. Freedom Church, 613 F.2d 316, 323 (1st Cir. 1979) (affirming right of summoned party who "evinces an interest in taking advantage of the adversary proceeding to which he is entitled prior to enforcement of an IRS summons"). Order, p.3. (A-82)

The First Circuit in United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979) referred to the requirement of a "sufficient showing" as a "threshold challenge" to the summons:

> "What is contemplated in Salter and in the cases cited supra is a threshold challenge to the summons by the summoned party, who thereby evinces an interest in taking advantage of the adversary proceeding to which he is entitled prior to enforcement of an I.R.S. summons." Freedom Church, 613 F.2d 316, 323.

The "threshold challenge" was similarly met by the Taxpayers in the recent New Hampshire case, Tulchinsky v. I.R.S., No. 90-421 (D.N.H. Dec. 18, 1990) (1990 U.S.Dist. LEXIS 17997). In Tulchinsky, the Taxpayers were granted an evidentiary hearing once they placed the summons in issue:

> "Upon review of the allegations and facts set forth by the

> Petitioners and in light of the possible inferences to be drawn therefrom, the Court finds that Petitioners have satisfied their burden of placing in issue the I.R.S.'s purpose in issuing summonses to Attorneys Sullivan and Conperto." Tulchinsky, 1990 U.S. Dist. LEXIS 17997 at 5.

The "threshold challenge", or a "sufficient showing", was satisfied by the Taxpayer in Tulchinsky alleging specific facts implying an improper purpose to the summons.

Judge Stahl, in his order, followed this same analysis to find that the taxpayer had met the minimum threshold. In a footnote in his Order regarding the "showing sufficient to pursue a 'sole criminal purpose' defense," (A-82), Judge Stahl wrote:

> The Court finds Petitioner's allegation that the summonses seek evidence from years outside the scope of Petitioner's civil

> audit, see Petition to Quash at ¶ 8, when coupled with the affidavit submitted by Petitioner's counsel, see Exhibit "A" attached to Petitioner's Memorandum in Response to Defendant's Motion for Summary Denial of Petition, constitute such "sufficient showing." (A-82).

The United States Supreme Court has affirmed the right to an adversary hearing prior to enforcement of an I.R.S. administrative summons. United States v. Powell, 379 U.S. 48, 58 (1964). At the hearing the "taxpayer may challenge the summons on any appropriate ground" Reisman v. Caplan, 375 U.S. 440, 499 (1964).

The Fifth Circuit has held that properly pleaded allegations of improper purpose are sufficient alone to trigger an evidentiary hearing. See United States v. Wright Motor Co., 536 F.2d 1090 (5th Cir.

1976) rehearing denied 542 F.2d 576 (1976), United States v. Roundtree, 420 F.2d 845 (5th Cir. 1970), United States v. Harkins, 628 F.2d 875 (5th Cir. 1980) and United States Southeast First National Bank of Miami Springs, 655 F.2d 661 (5th Cir. 1981).

In United States v. McCarthy, 514 F.2d 368, 373 (3rd Cir. 1975) the Third Circuit stated:

> Although our proposed procedure for summons enforcement contemplates that provision for an evidentiary hearing be an integral part of the proceedings, implicit in our design is the realization that not every summons enforcement proceeding will require an evidentiary hearing. Thus, if the person summoned neither puts in issue allegations of the complaint nor raises proper affirmative defenses, no evidentiary hearing will be required....

The Third Circuit then reviewed the

defendant's allegations and determined that even though "the allegations are indeed thin, they were sufficient to require the District Court to hear the evidence United States v. McCarthy, 514 F.2d 368, 375. See also United States v. Garden State Nat'l. Bank, 607 F.2d 61, 71 (3rd Cir. 1979).

The Ninth Circuit in United States v. Samuels, Kramer & Co., 712 F.2d 1342 (9th Cir. 1983) stated that,

> [A] taxpayer must answer the Government's prima facie case "through responsive pleadings, supported by affidavits, that allege specific facts in rebuttal." United States v. Kis, 658 F.2d 526, 539 (7th Cir. 1981) (emphasis in original). The facts, however, need only raise sufficient doubt about the Government's purposes in seeking an enforcement of a summons. United States v. Church of Scientology, 520 F.2d at 825. The taxpayer must thus allege facts "from which a court may **infer a possibility** of some

> wrongful conduct by the Government." United States v. Kis, 658 F.2d at 540. (emphasis added). This implication alone is enough to trigger a limited evidentiary hearing. At this stage, the taxpayer need not actually be able to prove the Government's lack of good faith.

712 F.2d 1344.

Cf. with United States v. Alphin, 809 F.2d 236, 238 (4th Cir. 1987) and Hintze v. Internal Revenue Service, 879 F.2d 121 (4th Cir. 1989) where the Fourth Circuit cited the above quotation from Kis, but did not find that the facts supported the intended inference.

The Sixth Circuit in United States v. Will, 671 F.2d 963 (6th Cir. 1982) while upholding the discretion of a District Court Judge to terminate cross examination during an evidentiary hearing, stated that a summonee bearing the burden of proving

bad faith, harassment or other abuse must be afforded an opportunity to substantiate his allegations citing United States v. Church of Scientology, 520 F.2d 818, 824 (9th Cir. 1975)

In summary, the great majority of the circuit courts cited above have liberally allowed an evidentiary hearing for taxpayers who have factually alleged by affidavit an improper purpose for issuance of an I.R.S. administrative summons. The First Circuit did not address in the decision below the decisions of the other circuits or the reasoning applied in its earlier decision United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979). In the decision under review Copp v. United States, 968 F.2d 1435 (1st Cir. 1992), the First Circuit has applied a restrictive test requiring the taxpayer to prove the

absence of a civil purpose for issuance of the administrative summons. Without an opportunity for an evidentiary hearing after a threshold showing of improper purpose, the I.R.S. will be able to summarily dispose of all I.R.S. enforcement proceedings by alleging a civil purpose for the summons. Granting an evidentiary hearing upon the showing of a minimal threshold of evidence will at least afford the taxpayer an opportunity to disprove the absence of a civil purpose despite the difficulty in meeting such a burden.

CONCLUSION

For reasons cited above, the Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 13, 1992

Raymond H. COPP, Jr., Petitioner,
Appellant,

v.

UNITED STATES of America,
Respondent, Appellee.

No. 92-1012.

United States Court of Appeals,
First Circuit.

Heard June 5, 1992.

Decided July 14, 1992.

Taxpayer filed a motion to quash a summons it had been issued by the Internal Revenue Service (IRS). The United States District Court for the District of Massachusetts, A. David Mazzone, J., granted the government's motion for summary enforcement. Taxpayer appealed. The Court of Appeals, Pieras, District Judge, sitting by designation, held that the taxpayer failed to show that the IRS had abandoned its purpose of investigating civil tax liability and, thus, the summons was enforceable, despite the taxpayer's claim that the summons had been served after the matter had been referred for investigation.

Affirmed.

rescue efforts, would not aid the swimmers in distress until the U.S. military

resources were exhausted.

1. Internal Revenue 4-4494

Taxpayer failed to show that Internal Revenue Service (IRS) had abandoned its pursuit of civil tax liability, even if "sole criminal purpose" defense to enforcement of summons had continuing vitality, taxpayer's allegations that audit had been expanded and that IRS would not nationally accept some requested additional documents was insufficient to overcome evidence that IRS was still investigating civil tax liability. 26 U.S.C.A. § 7602.

2. Internal Revenue 4514

In order to obtain evidentiary hearing to question propriety of Internal Revenue Service (IRS summons, taxpayer must make sufficient threshold showing that there was improper purpose behind summons by introducing evidence to support allegations of improper purpose. 26 U.S.C.A. § 7602.

3. Internal Revenue 4517

District court decisions to enforce Internal Revenue Service (IRS) summons without evidentiary hearing are reviewable under abuse of discretion standard. 26 U.S.C.A. § 7602.

Alfred D. Ellis with whom Loren Rosenzweig and Cherwin & Glickman were on brief, for petitioner, appellant.

Sally J. Schornstheimer, Atty., Tax Div., Dept of Justice, with whom James A.

Bruton, Acting Asst. Atty. Gen., Gary R. Allen, Charles E. Brookhart, Attys., Tax Div., Department of Justice, and Wayne A. Budd, U.S. Atty., were on brief for respondent, appellee.

Before CYR, Circuit Judge, RONEY**, Senior Circuit Judge, and PIERAS***, District Judge.

PIERAS, District Judge.

This appeal stems from the issuance of an administrative summons by the Internal Revenue Service in the course of investigation into the income tax liability of appellant Raymond H. Copp for the years 1985 through 1989. The district court granted an IRS motion for summary enforcement of the summons. We affirm.

The summons, which the IRS issued pursuant to 26 U.S.C. § 7602, directed Goldman Sachs & Co., a third-party recordholder to appear, give testimony and produce, documents. Appellant filed a motion Quash the summons, contending primarily that it was improperly served after the IRS had referred the matter to the Justice Department for criminal investigation. The district court

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**Of the Eleventh Circuit, sitting by designation.

***Of the District of Puerto Rico, sitting by designation.

rejected appellant's contention and granted the Government's motion for summary enforcement. Judge Mazzone found, based on an affidavit filed by the IRS agent directing the investigation that no criminal referral had been made and that the summons was issued in good faith to make a civil determination of Copp's federal income tax liability.

Prior to its amendment in 1982, 26 U.S.C. § 7602 authorized the IRS to issue summonses "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any persons for any internal revenue tax ..., or collecting any such liability." In United States v. LaSalle National Bank, 437 U.S. 298, 98 S. Ct 2357, 57 L.Ed.2d 221 (1978), the Supreme Court considered the limits of this authorization. The Court noted that since Congress created a tax enforcement system with interrelated criminal and civil elements, in enacting Section 7602 it did not intend that the IRS's subpoena power in a given investigation be limited merely because of the presence of a criminal purpose. Id. at 310-11, 98 S.Ct. at 2364-65. The Court held, however, that the IRS's subpoena power did not extend to investigations in which it had abandoned the good faith pursuit of all of its congressionally authorized civil purposes. 437 U.S. at 316-17, 98 S.Ct. at 2367-68.

As a result, after Lasalle a summonee could effectively block the enforcement of

an IRS summons if he could show that it was issued during an investigation in which the IRS had abandoned the pursuit of a civil tax determination or collection. In setting forth the reach of its holding, the LaSalle Court found that an abandonment clearly occurs (and a summons may not be issued) after the IRS refers an investigation to the Department of Justice for criminal prosecution. Id. at 311, 98 S.Ct. at 2365. In addition, aware of a potential for abuse where the IRS delays its referral to the Justice Department in order to gather evidence for a subsequent criminal prosecution, the Court found that an abandonment also occurs where the IRS has "in an institutional sense" abandoned its pursuit of a civil tax liability determination and is instead conducting its investigation for "solely criminal purposes." Id. at 316, 98 S.Ct. at 2367. On this appeal, Copp seeks to invoke this "sole criminal purpose" defense, which he contends the district court incorrectly found was overturned by the 1982 amendments to Section 7602.

[1] The LaSalle Court stated that taxpayers seeking to avail themselves of the sole criminal purpose defense "bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service." Id. As a result, even if the defense has continuing vitality, Copp has the burden of disproving that in this case the IRS is not pursuing a valid civil tax determination. The first hurdle which appellant must therefore clear is the

district court's finding that the IRS has not abandoned the pursuit of Copp's civil tax liability. Copp must show that this finding was clearly erroneous. See, e.g., Hintz v. IRS, 879 F.2d 121, 125 (4th Cir. 1989), reh'd denied en banc; United States v. Claes, 747 F.2d 491, 495 (8th Cir. 1984). We find that this burden has not been met. In seeking enforcement of an administrative summons, the IRS must meet the standard of good faith set forth in United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). It "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." Id. at 57-58, 85 S. Ct. at 255. In this case, the IRS filed an affidavit signed by Revenue Agent Ernest Van Loan which was uncontroverted and established each of these elements. The district court relied on this affidavit in finding that "there is no criminal referral, the summons was issued in good faith to make a correct determination of the petitioner's federal income tax liabilities, if any, for the taxable years under investigation, and all of the required procedures of the Internal Revenue Code have been followed." Implicit in the district court's ruling was a finding that in issuing its summons to Goldman Sachs the IRS was not seeking information solely for a criminal purpose. Even under LaSalle, the IRS is entitled to

enforcement of its summons where determination of civil tax liability is at least one of its purposes. Accord 437 U.S. at 310-11, 98 S.Ct. at 2364-65.

[2,3] Copp's effort to establish that the district court's ruling was clearly erroneous is limited. He alleges that several facts-including the alleged expansion of the audit to include tax years outside of 1988 and the refusal of the IRS to conditionally accept a portion of requested additional documents-constitute evidence of an improper purpose on the part of the IRS. He has not, however, demonstrated how these facts, none of which are inconsistent with a civil audit, suggest an improper purpose. Copp also relies on the fact that in a related case before Judge Stahl in the District of New Hampshire, based on similar allegations made by Copp in response to summonses issued in New Hampshire against other third-party recordkeepers, the court concluded that sufficient showing had been made for Copp to pursue a sole criminal purpose defense. Judge Stahl directed the IRS agent to appear at an evidentiary hearing at which Copp would be afforded the opportunity to examine the agent regarding his purpose in issuing the summonses. Judge Stahl's ruling is not before this Court on this appeal, however. And the fact that Judge Stahl in a separate proceeding has allowed Copp to proceed to an evidentiary hearing on this claim does not establish that Judge Mazzone's finding in this case was

clearly erroneous.[1]

The district court order of summary enforcement of the summons is therefore affirmed.

So ordered.

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[1]Copp also contends that Judge Mazzone erred in enforcing the IRS summons without conducting an evidentiary hearing. In order to proceed to an evidentiary hearing to question the propriety of an IRS summons, a taxpayer must make a sufficient threshold showing that there was an improper purpose behind an IRS summons. United States v. Salter, 432 F.2d 697 (1st Cir. 1970). To make this showing, the taxpayer must do more than allege an improper purpose; he must introduce evidence to support his allegations. Id. District court decisions to enforce a summons without a hearing are reviewable under the abuse of discretion standard. Accord Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 324 n. 7, 105 S.Ct. 725, 732 n. 7, 83 L.Ed.2d 678 (1985); Hintze, supra, 879 F.2d at 126; United States v. Samuels, Kramer & Co., 712 F.2d 1342, 1345 (9th Cir. 1983). Appellant again relies primarily on Judge Stahl's conclusion that the allegations made by Copp were sufficient to proceed to an evidentiary hearing. As with his substantive claim, the fact that Judge Stahl reached a contrary conclusion does not yield an abuse of discretion on the part of Judge Mazzone.

APPENDIX

Internal Revenue Code of 1986 (26 U.S.C.):

SEC. 7602 [as amended by Sec. 333(a), Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324]. EXAMINATION OF BOOKS AND WITNESSES.

(a) Authority to Summon, Etc.--For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other

person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose May Include Inquiry Into Offense.--The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) No Administrative Summons When There is Justice Department Referral.--

(1) Limitation of authority.--No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in

effect.--For purposes of this subsection--

(A) In general.--A Justice Department referral is in effect with respect to any person if--

(i) The Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination.--A Justice Department referral shall cease to be in effect with respect to a person when--

(i) the Attorney General notifies the Secretary, in writing, that--

(I) he will not prosecute such person for any

offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately.--For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

* * *

Internal Revenue Code of 1954 (as amended):

§ 7602. EXAMINATION OF BOOKS AND WITNESSES

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person

having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(Aug. 16, 1954, ch. 736, 68A Stat. 901; Oct. 4, 1976, Pub. L. 94-455, title XIX, § 1906(b)(13)(A), 90 Stat. 1834.)

92-827

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1992, Term

RAYMOND H. COPP, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
for the First Circuit

APPENDIX

Alfred D. Ellis
Counsel of Record
Marshall D. Stein
Cherwin & Glickman
One International Place
Boston, MA 02110-2622
617-330-1625

COUNSEL FOR PETITIONER

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UNITED STATES DISTRICT COURT DISTRICT
OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

Petition to Quash Internal Revenue Service Summons Pursuant to 26 U.S.C. § 7609(b)

INTRODUCTION

The Internal Revenue Service previously issued a summons with respect to Goldman Sachs & Co. on January 14, 1991. (See Exhibit "A"). On January 30, 1991, the taxpayer filed a Petition to Quash that summons in the Southern District of New York. The case was docketed for expedited hearing on March 12, 1991. Prior to the scheduled hearing date the I.R.S. withdrew the initial

summons and has substituted a summons substantially similar, but filed on the Boston office of Goldman Sachs & Co.

Petitioner, by his attorney, Alfred D. Ellis, allege upon information and belief:

1. This is a proceeding pursuant to 26 U.S.C. 7609 (b)(2) to quash a summons served on Goldman Sachs & Co. ("Goldman").

2. This Court has jurisdiction of this proceeding since Goldman, the person summoned is a corporation with offices in the District of Massachusetts and was served with the summons in this district.

3. Petitioner Raymond H. Copp, Jr. is an individual who resides in

Meredith, New Hampshire 03253.

4. On or about April 5, 1991 the Internal Revenue Service issued a summons to Goldman. A copy of the summons is attached as Exhibit "B".

5. On its face, the summons states that it relates to the tax liability of Raymond H. Copp, Jr. for the periods 1985-1989. The summons requires the production by Goldman on May 1, 1991 of records made and kept of the business transactions and affairs of Petitioner who is identified in the description of the records contained in the summons.

6. Goldman is a third party record

keeper within the meaning of 26 U.S.C. § 7609 (a)(3).

7. The withdrawal of the summons from one forum and its reissuance in another indicates that the IRS was shopping for a forum which would be amenable to the document request. It is appropriate to sue a corporation in any place it is subject to personal jurisdiction. 28 U.S.C.A. § 1391. By maintaining offices in New York and Boston, Goldman is subject to personal jurisdiction in both states. New York is the appropriate forum because that is the location of its corporate headquarters where Goldman

maintains its clients' records. The documents sought are being produced from that office. It has been held that the location of books and records is a factor in determining if venue is proper at a particular location. American Standard v. The Bendix Corp., 487 F.Supp 254 (1980). Therefore, the plaintiff's original choice of forum was appropriate and there was no apparent necessity to change it.

8. However, after a hearing date was set regarding the motions to quash the January 14, 1991 summons, the Assistant U.S. Attorney Stephen Froot for the Southern District of New York

advised the I.R.S. that the summons was overbroad. The I.R.S. then withdrew the summons. On April 5, 1991, they issued a new summons which is virtually identical to the other one (except to exclude the years 1990 and 1991). There was no attempt made to limit the scope of the document request. The major difference was that the new summons was served in Boston.

9. Venue is improper if the plaintiff's choice of one forum over another appropriate forum is motivated by his desire to avoid specific precedents. It has been stated, that forum

shopping is looked down upon when the choice of venue is based upon the avoidance of precedent in a particular district:

> "Had plaintiffs selected this forum to avoid specific precedents in the Northern District, the case for a transfer [by the defendant] would have been far stronger. Just as this district's local rules are designed to prevent shopping for individual judges - and thereby for the application of some anticipated view of the law - efforts to select one district to avoid or to obtain specific rulings of another district court should be disfavored and discouraged." In Matter of Cheeseman, et al. v. Carey, 485 F.Supp 203 (S.D.N.Y. 1980)

The sequence of events with regard to the January 14, 1991 summons indicate that the I.R.S. was forum shopping to avoid a court where the summons would not stand.

10. A summons issued pursuant to I.R.C. § 7602(a)(2) can be made to "any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax ...". A party cannot be compelled to produce any document over which it has no control. Traub v. U.S., 232 F.2d 43 (1955). It is the corporate headquarters who often

enjoys this control over its own books and records. Re Rivera, 79 F.Supp 51 (1948). Therefore, the original summons of January 14, 1991 was correctly served in New York, and should be maintained there. It is inappropriate to make this request on the Boston office which does not enjoy this same level of control.

11. Moreover, the issuance of this summons constitutes harassment to the taxpayer. This summons is substantially the same as the one the Internal Revenue Service issued on 1/14/91 (See Exhibit "A"). On January 31, 1991, the taxpayer filed a motion in the

Southern District of New York to quash that summons, which the Government subsequently withdrew. However, the only attempt made to modify the original request was to delete years 1990 and 1991. The "reissuance" of the summons has resulted in the duplication of efforts and expenses to the taxpayer.

12. Upon information and belief a Justice Department referral is in effect with respect to the taxpayer and no I.R.S. summons may be issued pursuant to 26 U.S.C. 7602 (c). The summons should be quashed because it was issued by the Internal Revenue

Service after the Department of Justice had begun investigating the taxpayer's potential criminal liability.

13. The summons requests records of the taxpayer for the years 1985-1989. The civil audit of the taxpayer occurring at the Laconia, New Hampshire office of the I.R.S. has largely been limited to the 1988 tax year. This summons was reissued before the taxpayer had an opportunity to assemble documents for any of the prior years. The summons is vague and overbroad and constitutes an unreasonable search and seizure in violation of the Fourth Amendment to the

Constitution of the United States.

14. The materials sought under the summons must be limited to the ends sought and is unreasonable "if it is overbroad, out of proportion to the ends sought", or, if it is "so unrelated to the matter properly under inquiry as to exceed the investigatory power", U.S. v. Harrington, 388 F.2d 520 (2d Cir. 1968), citing McMann v. SEC, 87 F.2d 377 (2d Cir. 1937), and U.S. v. Morton Salt, Co., 338 US 632 (1950). It has also been recognized that a stricter standard of relevance is applied when the summons is directed to

a third party, as opposed to the taxpayer himself. U.S. v. Harrington, 388 F.2d 520 (2d Cir. 1968), Garpeg v. U.S., 583 F. Supp. 789 (U.S.S.D. N.Y. 1984), U.S. v. The Freedom Church, 613 F.2d 316 (1st Cir. 1979).

15. The summons served seeking all records for the period from 1985-1989 is overbroad and misproportionate to the end sought. If allowed enforcement of the summons will constitute a "fishing expedition" through the petitioners records in excess of the relevant scope of the summons power. See U.S. v. Richards, 631 F.2d 341 (4th Cir.

1980).

16. Upon information and belief the government cannot demonstrate the particularity necessary for the government to carry its burden required under the standard for relevancy for all tax years prior to and following the year under audit (1988). See U.S. v. Goldman, 637 F.2d 664 (9th Cir. 1980).

17. Petitioner requests an evidentiary hearing to resolve the issues raised by this petition.

18. The Petitioner's representative has sent a copy of this motion to the other side and to the party summoned. Enclosed is the

certificate of mailing.

19. The Petitioner's representative made a good faith attempt to contact the Revenue Officer regarding this motion. The Revenue Officer insisted upon enforcement of the summons, and would not accept submission of documents in part until completion of the search by the taxpayer of all relevant records.

WHEREFORE, Petitioner respectfully demands judgment quashing the Summons and granting such other and further relief as the Court may deem just, including Petitioner's reasonable attorney's fee.

DATED: Boston, MA
April 11, 1991

A-15(a)

SUMMONS

Department of the Treasury
Internal Revenue Service

Jean

Raymond H. Copp, Jr.
P.O. Box 701
Meredith, NH 03253

EXHIBIT "6"

matter of _____ SSN: 001-46-4840

al Revenue District of Portsmouth Periods 1985,1986,1987,1986,1989

Commissioner of Internal Revenue
Jeane Snow - Vice President Administration
Goldman Sachs & Co.
Exchange Place
53 State St.
Boston, MA 02109

C: hereby summoned and required to appear before Ernest Van Loan, Revenue Agent
of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal laws concerning the person identified above for the periods shown.

Records of all accounts in the name of Raymond H. Copp, Jr. and records of all accounts over which he had signature authority in any capacity for the years 1985 through 1989. All records of bonds purchased by Raymond H. Copp, Jr. in any capacity during the years 1985 through 1989.

siness address and telephone number of Internal Revenue Service officer named above:

719 N. Main St., Laconia, NH 03246 (603) 528-8794

Place and time for appearance:

at ~~Goldman Sachs & Co., Exchange Place, 53 State St., Boston, MA 02109~~

on the 8th day of May, 19 91 at 10:00 o'clock a.m.

Issued under authority of the Internal Revenue Code this 10th day of April, 19 91

Ernest Van Loan — Revenue Agent
Signature of Issuing Officer — Title

Signature of Approving Officer (if applicable) — Title

BEST AVAILAB

A-15(b)

Summons

Department of the Treasury
Internal Revenue Service

Jean

Raymond H. Copp, Jr.
P.O. Box 701
matter of Meredith, NH 03253 SSN: 001-46-4840

EXHIBIT "B"

al Revenue District of Portsmouth Periods 1985,1986,1987,1988,1989

ommissioner of Internal Revenue
Jeanne Snow - Vice President Administration
Goldman Sachs & Co.
Exchange Place
53 State St.
Boston, MA 02109

hereby summoned and required to appear before Ernest Van Loan, Revenue Agent
of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data
the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the administration or enforcement of the internal
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at ~~Goldman Sachs & Co., Exchange Place, 53 State St., Boston, MA 02109~~

on the 8th day of May 19 91 at 10:00 o'clock a.m.

Issued under authority of the Internal Revenue Code this 10th day of April 19 91

Ernest Van Loan Revenue Agent
Signature of Issuing Officer Title

Signature of Approving Officer (if applicable) Title

23304.1

LE COPY

Respectfully submitted,
Raymond H. Copp, Jr. by his attorney,

_____

Alfred D. Ellis,, Esquire
CHERWIN & GLICKMAN
One International Place
Boston, MA 02110

UNITED STATES DISTRICT COURT DISTRICT
OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

ANSWER OF THE UNITED STATES TO
PETITION TO QUASH

NOW COMES the United States and responds to the above-captioned petition to quash as follows:

The United States responds to the first unnumbered paragraph of the petition as follows: It admits it issued a summons to Goldman Sachs & Co. ("Goldman Sachs") on January 11, 1991, but denies the date of issuance alleged, a true copy of that summons is attached to the petition without an identifying exhibit number; it

admits taxpayer filed of a petition to quash as alleged, admits docketing in the Southern District of New York, as alleged, admits withdrawal of the summons, admits serving a new summons on the Boston office of Goldman Sachs, but does not respond to allegations regarding comparisons of the two summonses, copies of which are attached to the petition, as those documents speak for themselves.

The United States responds to the numbered allegations of the petition as follows:

1. It admits the allegations of paragraph 1.

2. It admits the allegations of paragraph 2.

3. It admits the allegations of paragraph 3.

4. It admits the allegations of paragraph 4, except that the summons is not identified by exhibit number.

5. It responds to the allegations of paragraph 5 by that the asserting that the summons, a copy of which is attached to the petition, speaks for itself as to its contents.

6. It admits the allegations of paragraph 6.

7. It denies the IRS was forum shopping, does not respond to the allegations of law regarding proper forums, denies New York is the appropriate forum for this action, is without knowledge or information sufficient to form a belief as to where Goldman Sachs keeps its clients, records, does not respond to allegations of law as to

factors determining proper forum, and denies the conclusion of law in paragraph 7 of the petition, while denying the allegation that there was no need to change the original forum.

8. It denies Assistant U.S. Attorney Stephen Froot advised the IRS that the summons was overbroad, admits the IRS withdrew the first summons, admits on April 5, 1991, a new summons was issued, and does not respond to allegations and characterizations regarding the comparison of the two summonses, as they are attached to the petition and speak for themselves.

9. It does not respond to the allegation of law regarding proper venue and denies the IRS engaged in forum shopping or withdrew the first summons for reasons relating to judicial precedent.

10. It does not respond to the allegations of law contained in paragraph 10 and denies service of the summons on the New Hampshire office of Merrill Lynch is inappropriate.

11. It denies the summonses issued with respect to the petitioner constitute harassment, does not respond to characterization as to the similarity of the summonses, as the documents speak for themselves, admits petitioner moved to quash the summons served in New York, admits the IRS withdrew the summons, denies the characterization that the summons was reissued, and is without knowledge as to whether counsel for the petitioner duplicated his efforts and charged his client therefor.

12. It denies a Justice Department

referral is in effect with respect to the taxpayer, does not respond to the allegations of law contained in paragraph 12, and denies the remaining allegations of fact in paragraph 12.

13. It admits the summons requests taxpayer records for the years 1985 through 1989. It denies the IRS audit of the taxpayer is limited to 1988. With respect to petitioner's allegations of his attempts to assemble records requested by the summons, the United States avers that production of documents by the petitioner is not requested by, and is not responsive to, the summons at issue in this action served on a third-party recordkeeper for records kept by that third-party recordkeeper. Responding to petitioner's allegations, however, it admits the IRS

has insisted on compliance with the summons and would not accept a partial production of documents produced by the petitioner; it denies the summons is vague or overbroad or violates petitioner's rights.

14. Paragraph 14 of the petition contains allegations of law to which no response is required.

15. It denies the allegations of fact contained in paragraph 15 and does not respond to the allegations of law contained therein.

16. It denies the allegations of fact contained in paragraph 16 and does not respond to the allegations of law contained therein.

17. It denies petitioner is entitled to an evidentiary hearing.

18. It admits the United States received a copy of this petition that petitioner's counsel certifies was sent by him, but is without knowledge or information regarding service upon the party summoned; it admits a certificate of service is attached to the petition.

19. The United States avers that the summons at issue does not seek production of documents by the petitioner, and any such production is not responsive to the summons, which seeks records from third-party recordkeepers. Responding to petitioner's allegations, it admits petitioner's representative conferred with the Revenue officer investigating this matter. It admits the IRS has insisted on compliance with the summons, admits petitioner offered to produce some of the

requested documents, but denies petitioner agreed to locate and produce all requested documents.

WHEREFORE, the United States prays the petition be dismissed and the United States be granted such other and further relief as this Court deems proper and just.

JEFFREY R. HOWARD
United States Attorney

GRETCHEN LEAH WITT
Assistant US Attorney

DAVID S. NEWMAN
Trial Attorney, Tax Division
U.S. Department of Justice
Post-Office Box 55
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6550

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and the attorney of record for each other party by mail on June 19, 1991.

David S. Newman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

UNITED STATES' MOTION FOR PROTECTIVE ORDER

NOW COMES the respondent, the United States of America, by its attorney, Wayne A. Budd, United States Attorney for the District of Massachusetts, and moves this Court, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, for a protective order against answering petitioner's interrogatories on the grounds that discovery is not appropriate in this proceeding to determine the validity of an Internal Revenue summons. A

memorandum of law is filed herewith and in support hereof.

For the foregoing reason, the United States prays this Court issue a protective order with respect to petitioner's interrogatories served in this action.

WAYNE A. BUDD
United States Attorney

SUSAN M. POSWISTILO
Assistant United States Attorney

DAVID S. NEWMAN
Trial Attorney,
Tax Division
U.S. Department of Justice
Washington, D.C. 20044
Telephone: (202) 307-6550

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
91-11214-N

RAYMOND H. COPP, JR.
Petitioner, Taxpayer

V.

UNITED STATES OF AMERICA
Respondent

ORDER

August 7, 1991

COHEN, M.J.

Pursuant to Rules 7.1(d) and (e) of the Local Rules of this Court (effective September 1, 1990), and upon review of the relevant pleadings, the United States' Motion for Protective Order (#09) is allowed.

In support of its motion, the United States says that - in view of the prior

declaration by Internal Revenue Agent Van Loan to the effect that there had been no "referral" to the Justice Department - petitioner has not presented a scintilla of evidence supporting the so-called "information and belief" averment that there had been a referral, and thus, under the "bright line" test set forth in 26 U.S.C. § 7602(c), no discovery is appropriate.

In opposition to the motion, petitioner points to United States v. Michaud, 907 F.2d 750 (7th Cir. 1990) (en banc), and United States v. Stuart, 489 U.S. 353 (1989), and suggests that the test encompasses more than simply "Justice Department referral" vel non.

Petitioner's argument, however, puts the cart before the horse. If the

government is correct in its position - a point which is not as erroneous as suggested by petitioner[1] - that is a matter which should first be resolved[2]

---

[1] The Supreme Court in Stuart did not reach that particular issue, since it simply held that § 7602(c) did not apply to a request for information by a foreign government.

The en banc panel in Michaud - albeit suggesting that the "institutional commitment" test set forth in United States v. LaSalle National Bank, 437 U.S. 298 (1978), survived the amendments to § 7602(c) - remanded the matter because of ambiguities in the record. And Judge Posner, in dissent, joined by Judges Easterbrook, Ripple, and Manion, has set forth a persuasive and convincing argument to the effect that Congress meant what it said, and said what it meant, and that Section 7602(c)- permits the issuance of a summons prior to Justice Department referral even if criminal offenses will be investigated. Michaud, supra, at 755-57.

[2] In the context of a motion to dismiss and/or for summary judgment, or otherwise. If the district judge should determine that the government is correct in its position, then no discovery

before permitting the petitioner to rummage through the government files.[3]

The United States' Motion for Protective Order (# 09) is accordingly allowed.

Lawrence P. Cohen [s]
UNITED STATES MAGISTRATE JUDGE

---

whatsoever will be required.

[3] Insofar as this court can determine, the interrogatories propounded by petitioner do not bear directly on the question of "Justice Department referral," or relevancy.

Indeed, many of those interrogatories are clearly overbroad, seeking information about that which the government has discovered to date, not to mention the names of "snitches". To this extent, it is clear that petitioner seeks to "rummage."

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

PETITIONER'S MOTION TO RECONSIDER MAGISTRATE COHEN'S ORDER OF AUGUST 7, 1991 AND/OR STAY SAID ORDER UNTIL AUGUST 26, 1991 OR IF THE RESPONDENT REQUESTS INTERLOCUTORY RELIEF PURSUANT TO 28 U.S.C. 1292(b) TO SUCH TIME AS THE FIRST CIRCUIT RULES ON SAID INTERLOCUTORY RELIEF

Introduction

This Motion is brought pursuant to Rule 2 of the Magistrate's Rule of Court seeking reconsideration of Magistrate Cohen's Order of August 7, 1991. Petitioner is attaching as Exhibit "A" the order of Judge Stahl in the Federal District Court of New Hampshire, dated

August 16, 1991.

Petitioner, through his attorney represents as follows:

1. That Petitioner has filed eight petitions to quash third party Internal Revenue Service summonses in the District Court of New Hampshire under the consolidated number of 91-069-S.

2. That similarly to the pending Massachusetts action in this case, there were two motions before the court: (1) respondent United States' Motion for a Protective Order and (2) Respondent United States' Motion For Summary Denial of the Petition to Quash.

3. That Petitioner through his

attorney in the consolidated New Hampshire action filed a set of interrogatories substantially similar to those filed in this matter, for which the Respondent sought a protective order.

4. That Judge Stahl in the New Hampshire action has determined that the "sole criminal purpose" test of United States v. LaSalle National Bank, 437 U.S. 298 (1978) has survived TEFRA, 26 U.S.C. § 7602(b) and (c)(2). See attached slip opinion, p.6. Further, the District Court certified the matter for an interlocutory appeal pursuant to 28 U.S. C. SS 1292 (b). Id. Judge Stahl gave the United

States ten (10) days to file an interlocutory appeal, August 26, 1991.

WHEREFORE, Petitioner requests that Magistrate Cohen either reconsider his decision in light of Judge Stahl's order of August 16, 1991 or alternatively stay his order until the later of August 26, 1991 or if the Respondent requests interlocutory relief pursuant to 28 U.S.C. 1292(b) until such time as the First Circuit rules on said interlocutory appeal.

Respectfully submitted for
Petitioner by his attorney,

Alfred D. Ellis, Esquire
BBO #153280
CHERWIN & GLICKMAN
One International Place
Boston, MA 02110
Tel. (617) 330-1625

Dated: August 21, 1991

CERTIFICATE OF SERVICE

I, Alfred D. Ellis, hereby certify that on the 21st day of August, 1991, I served a copy of the within Petitioner's Motion to Reconsider Magistrate Cohen's Order of August 7, 1991 by first class mail, postage prepaid to David S. Newman, Trial Attorney, Tax Division, U.S. Department of Justice, Post Office Box 55, Ben Franklin Station, Washington, D.C. 20044.

Alfred D. Ellis

Alfred D. Ellis

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

UNITED STATES' AMENDED ANSWER AND COUNTERCLAIM FOR SUMMARY ENFORCEMENT

NOW COMES the United States of America and asserts, for its amended answer to the above-captioned petition to quash, as follows:

The United States responds to the first unnumbered paragraph of the petition as follows: It admits it issued a summons to Goldman Sachs & Co. ("Goldman Sachs") on January 11, 1991, but denies the date of issuance alleged, a true copy of that

summons is attached to the petition without an identifying exhibit number; it admits taxpayer filed a petition to quash as alleged, admits docketing in the Southern District of New York, as alleged, admits withdrawal of the summons, admits serving a new summons on the Boston office of Goldman Sachs, but does not respond to allegations regarding comparisons of the two summonses, copies of which are attached to the petition, as those documents speak for themselves.

The United States responds to the numbered allegations of the petition as follows:

1. It admits the allegations of paragraph 1.

2. It admits the allegations of paragraph 2.

3. It admits the allegations of paragraph 3.

4. It admits the allegations of paragraph 4, except that the summons is not identified by exhibit number.

5. It responds to the allegations of paragraph 5 by asserting that the summons, a copy of which is attached to the petition, speaks for itself as to its contents.

6. It admits the allegations of paragraph 6.

7. It denies the IRS was forum shopping, does not respond to the allegations of law regarding proper forums, denies New York is the appropriate forum for this action, is without knowledge or information sufficient to

form a belief as to where Goldman Sachs keeps its clients' records, does not respond to allegations of law as to factors determining proper forum, and denies the conclusion of law in paragraph 7 of the petition, while denying the allegation that there was no need to change the original forum.

8. It denies Assistant U.S. Attorney Stephen Froot advised the IRS that the summons was overbroad, admits the IRS withdrew the first summons, admits on April 5, 1991, a new summons was issued, and does not respond to allegations and characterizations regarding the comparison of the two summonses, as they are attached to the petition and speak for themselves.

9. It does not respond to the allegation of law regarding proper venue

and denies the IRS engaged in forum shopping or withdrew the first summons for reasons relating to judicial precedent.

10. It does not respond to the allegations of law contained in paragraph 10 and denies service of the summons on the Boston office of Goldman Sachs & Co. is inappropriate.

ii. it denies the summonses issued with respect to the petitioner constitute harassment, does not respond to characterization as to the similarity of the summonses, as the documents speak for themselves, admits petitioner moved to quash the summons served in New York, admits the IRS withdrew the summons, denies the characterization that the summons was reissued, and is without knowledge as to whether counsel for the

petitioner duplicated his efforts and charged his client therefor.

12. It denies a Justice Department referral is in effect with respect to the taxpayer, does not respond to the allegations of law contained in paragraph 12, and denies the remaining allegations of fact in paragraph 12.

13. It admits the summons requests taxpayer records for the years 1985 through 1989. It denies the IRS audit of the taxpayer is limited to 1988. With respect to petitioner's allegations of his attempts to assemble records requested by the summons, the United States avers that production of documents by the petitioner is not requested by, and is not responsive to, the summons at issue in this action served on a third-party recordkeeper for

records kept by that third-party recordkeeper. Responding to petitioner's allegations, however, it admits the IRS has insisted on compliance with the summons and would not accept a partial production of documents produced by the petitioner; it denies the summons is vague or overbroad or violates petitioner's rights.

14. Paragraph 14 of the petition contains allegations of law to which no response is required.

15. It denies the allegations of fact contained in paragraph 15 and does not respond to the allegations of law contained therein.

16. It denies the allegations of fact contained in paragraph 16 and does not respond to the allegations

of law contained therein.

17. It denies petitioner is entitled to an evidentiary hearing.

18. It admits the United States received a copy of this petition that petitioner's counsel certifies was sent by him, but is without knowledge or information regarding service upon the party summoned; it admits a certificate of service is attached to the petition.

19. The United States avers that the summons at issue does not seek production of documents by the petitioner, and any such production is not responsive to the summons, which seeks records from third-party recordkeepers. Responding to petitioner's allegations, it admits petitioner's representative conferred with the Revenue officer investigating this

matter. It admits the IRS has insisted on compliance with the summons, admits petitioner offered to produce some of the requested documents, but denies petitioner agreed to locate and produce all requested documents.

WHEREFORE, the United States prays the petitioner be dismissed and the United States be granted such other and further relief as this Court deems proper and just.

COUNTERCLAIM OF THE UNITED STATES

For its counterclaim in the above-captioned case, the United States asserts as follows:

1. The petitioner, Raymond H. Copp, Jr., also the taxpayer whose tax liabilities are the subject of the

Internal Revenue Service investigation, brought this action to quash the Internal Revenue Service summons served on Goldman Sachs & Co. (the "Summons").

2. This Court has subject matter jurisdiction to enforce and to compel compliance with Internal Revenue Service summons pursuant to 26 U.S.C., Sections 7402(b), 7604(a), and 7609(h)(1).

3. Revenue Agent Van Loan is conducting an investigation to determine the correct federal income tax liabilities of Raymond H. Copp, Jr. ("the taxpayer"), for the taxable years 1985 through 1989.

4. On April 10, 1991, the Internal Revenue Service issued a summons, in accordance with 26 U.S.C. Section 7602, with respect to records of Raymond H. Copp, Jr., which records were in the

possession of a third-party recordkeeper, Goldman Sachs & Co. The summons was served on Goldman Sachs & Co. on April 10, 1991, on which date notice was given Raymond H. Copp, Jr., by certified mail, in accordance with 26 U.S.C. Section 7609.

5. Revenue Agent Ernest Van Loan, who issued the summons, a photocopy of which is attached to his declaration filed herewith, is a Revenue Agent of the Examination Division of the Internal Revenue Service, with a post of duty in Laconia, New Hampshire. Revenue Agent Van Loan is authorized to utilize Internal Revenue Service summonses issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C., Section 7602 and Treasury Regulations, Section 301.7602-1; IRS Delegation Order No. 4 (as

revised).

6. The summoned person, Goldman Sachs & Co., is a third party recordkeeper, within the meaning of Section 7609 of the Internal Revenue Code, 26 U.S.C., with offices at Exchange Place, 53 State Street, Boston, Massachusetts, within the jurisdiction of this Court.

7. As of the date of this response, there is no "Justice Department referral," as that tern is described in 26 U.S.C., Section 7602(c), in effect with respect to the taxpayer for any of the years under investigation.

8. Revenue Agent Van Loan has reason to believe the taxpayer engaged in financial transactions with Goldman Sachs & Co. during the years 1985 through 1989, the years under investigation. It is

believed therefore, that Goldman Sachs & Co. is in possession of books, records, or other data, and testimony relating to the taxpayer's correct income tax liabilities for the years under investigation.

9. The petitioner commenced the above-titled proceeding to quash the Summons within 20 days of the giving to him of notice of thereof, on April 10, 1991.

10. On May 8, 1991, Goldman Sachs & Co., the summoned person, failed to appear in response to the summons, to give testimony, or to produce the summoned data for examination as required by the summons; these failures continue to the date of this motion.

11. The testimony and the books, records, papers and other data demanded by

the summonses are not already in the possession of the Internal Revenue Service.[1]

12. The testimony and the books, records, papers and other data demanded by the summons are necessary for the correct determination of the federal income tax liabilities of Raymond H. Copp, Jr., for the years under investigation and might shed light on the correctness of the taxpayer's federal income tax returns or his correct federal income tax liabilities for the taxable years under investigation.

13. All procedures required by the Internal Revenue Code, as amended, were followed with respect to this summons.

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[1] As described in the Declaration of Ernest Van Loan, one of the summoned documents was provided to the IRS by taxpayer's representative.

14. The United States seeks, pursuant to Section 7609(b)(2)(A), to compel compliance with the Summons.

For the foregoing reasons, the United States prays this Court order the enforcement of the IRS administrative summons served upon Goldman Sachs & Co. and grant the United States such other and further relief as the Court deems proper and just.

WAYNE A. BUDD
United States Attorney

SUSAN M. POSWISTILO
Assistant US Attorney

DAVID S. NEWMAN
Trial Attorney,
Tax Division
U.S. Department of Justice
Post Office Box 55
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 307-6550

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each other party with a courtesy to the summoned party by mail on September 23, 1991.

_____

David S. Newman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

DECLARATION OF REVENUE AGENT
ERNEST VAN LOAN

Ernest Van Loan, pursuant to the provisions of 28 U.S.C., Section 1746 certifies that:

1. I am a Revenue Agent of the Examination Division of the Internal Revenue Service, employed in the New Hampshire Internal Revenue District, with a post of duty at 719 N. Main Street, Laconia, New Hampshire.

2. I am presently conducting an

examination to determine the correct federal income tax liability of Raymond H. Copp, Jr. ("the taxpayer"), for the taxable years 1985 through 1989.

3. I an authorized to utilize Internal Revenue Service summonses issued under the authority of Section 7602 of the Internal Revenue Code, 26 U.S.C., Section 7602 and Treasury Regulations, Section 301.7602-1; IRS Delegation Order No. 4 (as revised).

4. As of the date of this declaration, there is no "Justice Department referral," as that term is described in 26 U.S.C., Section 7602(c), in effect with respect to the taxpayer for any of the taxable years 1985 through 1989.

5. During the course of my

examination of the taxpayer, I learned the taxpayer engaged in financial transactions with Goldman Sachs & Co. during the year 1988, one of the years under examination, as the taxpayer held an account with that firm during that year. Based upon this and other information disclosed by my investigation I believe the taxpayer may have engaged in transactions with Goldman Sachs & Co. during the other years under investigation. Information about any such accounts will assist in the determination of the amounts of income earned during the years under investigation.

6. Pursuant to my examination and in accordance with Section 7602 of the Internal Revenue Code, I issued an Internal Revenue Service summons to Goldman Sachs & Co., a photocopy of that

summons was attached to the petition filed in this action, and a photocopy is attached to this declaration and designated Exhibit A.

7. Service of the summons was made and notice of the summons was given as required by law, as is evidenced by the completed Certificates of Service and of Notice on Exhibit A, page 2.

8. All procedures required by the Internal Revenue Code, were followed with respect to this summons.

9. The above-titled proceeding was commenced within 20 days of the giving of notice of the summons to the petitioner.

10. The summoned person failed to appear in response to the summons, to give testimony, or to produce the summoned data for examination as required by the

summons; these failures continue to the date of this declaration.

11. With the exception of a single document provided by the taxpayers representative, the testimony and the books, records, papers, and other data demanded by the summons issued to and served upon Goldman Sachs & Co. are not already in the possession of the Internal Revenue Service.

12. The testimony and the books, records, papers, and other data demanded by the summons issued to and served upon Goldman Sachs & Co. are necessary for the correct determination of the federal income tax liability of the taxpayer for the years under investigation.

13. Documents shown to me by the taxpayer's power of attorney established

that taxpayer spent in excess of one million dollars ($1,000,000) in real estate purchases in 1988.

14. The taxpayer's power of attorney stated that taxpayer made the purchases of real estate at issue with funds from rollovers of bonds and an inheritance from his grandparents 20 years ago.

15. The summoned documents will assist in the tracing of any funds used by the taxpayer for the above-described purchases of real estate.

I certify under penalty of perjury that the foregoing is true and correct.

Executed at Laconia, New Hampshire, this 10th day of September, 1991.

_____

Ernest Van Loan,
Revenue Agent
Examination Division
Internal Revenue Service

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each other party and the summoned person by mail on September 23, 1991.

_____

David S. Newman

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

UNITED STATES' MOTION FOR
SUMMARY ENFORCEMENT

The United States of America hereby moves this Court to enforce the summons issued by the Internal Revenue Service on April 10, 1991, and served on Goldman Sachs & Co. with respect to records of the petitioner in this action.

As grounds for its motion, the United States asserts that the summons was duly issued in good faith and all statutory requirements have been met for enforcement. In support of its motion, the

United States files herewith the declaration of Revenue Agent Ernest Van Loan and a memorandum of law.

For the foregoing reasons, the United States prays this Court order the enforcement of the IRS administrative summons.

ALLOWED. On the basis of the uncontroverted Van Loan affidavit, there is no criminal referral. The summons was issued in good faith to make a conch determinations of the petitioner's federal income tax liabilities, if any, for the taxable years under investigation, and all of this required procedures of the Internal Revenue Code have been followed.

A. David Mazzone

WOJ 11/27/91

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

ENFORCEMENT ORDER AND JUDGMENT

This matter having come before the Court on the United States' motion for summary enforcement of an administrative Internal Revenue Service summons served upon Goldman Sachs & Co. as third-party recordkeeper of the records of Raymond Copp. Jr., the parties having had full opportunity to be heard, and it appearing that the summons issued by Revenue Agent Ernest Van Loan and served upon Goldman Sachs & Co. on April 10, 1991: (1) was

issued for the purposes of investigating the correct federal income tax liabilities for Raymond H. Copp, Jr., for the years 1985 through 1989, and ascertaining whether the Raymond H. Copp, Jr. has committed any offense connected with the administration or enforcement of the internal revenue laws, which are legitimate purposes of the use of administrative summonses, (2) that the summoned testimony and data may be relevant to those determinations, (3) that the testimony and other data sought are not already in the possession of the Internal Revenue Service, and (4) that the administrative steps required by the Internal Revenue Code have been followed, it is therefore

ORDERED, ADJUDGED and DECREED that

the Goldman Sachs & Co. appear before Revenue Agent Ernest Van Loan, or his designated representative, at 2:30 p.m. on December 13, 1991, at the offices of Goldman Sachs & Co., Exchange Place, 53 State Street, Boston, Massachusetts, then and there to be sworn, to give testimony, and to produce the books, records, papers, and other data as demanded by the summons served upon it on April 10, 1991, for examination and for copying by photographic or other mechanical means of reproduction, with such examination and copying to continue from day-today until completed.

DONE and ORDERED this 27th day of November, 1991, at Boston, Massachusetts.

A. David Mazzone
UNITED STATES DISTRICT JUDGE

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each other party and the summoned person by mail on September 23, 1991

David S. Newman

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

RAYMOND H. COPP, JR.,	)	
	)	91-069-S
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	

O R D E R

In this consolidated civil action, petitioner Raymond E. Copp, Jr. moves to quash eight third-party Internal Revenue Service ("IRS') administrative summonses which seek certain of Petitioner's financial records from the years 1985 through 1991. The action is brought pursuant to 26 U.S.C. S 7609 (b) (2), with jurisdiction being grounded upon 26 U.S.C. § 7609 (h) (1). There are two Motions before the Court: (1) respondent United

States, motion for a protective order, and (2) respondent United States, motion for summary denial of petition to quash and for enforcement of IRS summons served upon Kevin F. Sullivan, Esquire.

1. Motion for Protective Order

Respondent has filed the above-referenced motion pursuant to Rule 26(c), Fed. R. Civ. P., asking this Court to excuse it from answering certain interrogatories designed to elicit whether respondent is contemplating a criminal referral to the Justice Department. In support of its motion, respondent argues that even if it were contemplating a criminal referral, such referral would not be improper. Therefore, it contends, discovery on this matter is irrelevant. Petitioner responds that the true purpose

of the summons is to gather information for an eventual criminal referral to the Justice Department and that, under relevant case law, such purpose is not allowable.

Before the IRS is entitled to enforcement of a challenged summons, it must make a prima facie showing of "good faith." United States v. Michaud, 907 F.2d 750, 752 (7th Cir. 1990) The prima facie case must include the following elements:

> [The IRS] must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the [Service's] possession, and [4] that the administrative steps required by the Code have been followed.

Id. (quoting United States v. Powell, 379

U.S. 48, 57-58 (1964)). Furthermore, 26 U.S.C. § 7602(c) specifically bans the issuance of administrative summonses when a Justice Department referral is in effect.

Here, petitioner contends that the above-noted criminal referral allegedly contemplated by the IRS makes the purpose of the summons illegitimate. In so doing, it relies on United States v. LaSalle National Bank, 437 U.S. 298 (1978), where the Supreme Court read 26 U.S.C. § 7602 as including a prohibition on the IRS's use of an administrative summons solely for the purpose of criminal investigations prior to Justice Department referrals. See id. at 316-17. ("We shall not countenance delay in submitting a recommendation to the Justice Department when there is an

institutional commitment to make the referral and the [IRS] merely would like to gather additional evidence for the prosecution.")

Respondent does not deny that a future referral is possible; rather, it argues that the 1982 amendments to 26 U.S.C. S 7602, passed as part of the Tax Equity and Fiscal, Responsibility Act of 1982 (hereinafter "TEFRA") and codified at § 7602(b)[1] and 602(c)(2)[2] eliminate the

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[1] 26 U.S.C. § 7602(b) provides:

Purpose may include inquiry into offense.- The purposes for which the Secretary may [issue the summons] include the purpose of inquiring into any offence connected with the administration or enforcement of the internal revenue laws.

[2] In pertinent part, 26 U.S.C. § 7602 (c) (2) states:

Justice Department referral In effect.- For purposes of this subsection-

"sole criminal purpose" defense recognized in LaSalle. It is respondent's position that § 602(c) contemplates a "bright-line" rule whereby the only relevant inquiry is whether a Justice Department referral actually has been made.

The question of whether LaSalle's "sole criminal purpose" defense survived the TEFRA has engendered a split of authority. Compare, e.g., .Michaud, supra, at 752 and Hintze v. I.R.S., 879 F.2d 121, 127 (4th Cir. 1989) (recognizing continued

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> (A) In general. A Justice Department Referral is in effect with respect to any person if -
>
> (i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws[.]

existence of "sole criminal purpose" defense) with LaMura v. United States, 765 F.2d 974, 980 n. 9 (11th Cir. 1985); Pickel v. United States, 746 F.2d 176, 183-84 (3rd Cir. 1984); and Segmond v. United States, 589 F. Supp. 568, 573 (S.D.N.Y. 1984) (embracing the "bright-line" view respondent urges here). The Supreme Court has revisited LaSalle in light of the 1982 amendments to 26 U.S.C. § 602. See United States v. Stuart, 489 U.S. 353, 363 (1989). "When Congress codified the essence of our holding [in LaSalle] in § 7602(c), it apparently shared our concern about permitting the IRS to encroach upon the rights of potential criminal defendants.") However, even this statement has been accorded contradictory interpretations. Compare

Michaud, supra, at 752 n 2 (Bauer J.) and Hintze, supra, at 127 (citing Stuart as supporting the view that the "sole criminal purpose" defense has continuing-vitality) Michaud, supra, at 757 (Posner, J., dissenting) (arguing that the majority opinion "misunderstands Stuart" and "misunderstands section 7602(c) and its interplay with 7602(b)").

The First Circuit has not yet had occasion to address Stuart's impact on this issue. However, in its most recent foray into the realm of the administrative summons, the court indicated, in dicta, its concurrence in the view that the "sole criminal purpose" defense survived the enactment of TEFRA. See United States v. Lawn Builders of New England, Inc., 856 F.2d 388, 391-92 (1st

Cir. 1988) ("[T]he IRS must not have abandoned the pursuit of civil tax determination or collection" in order to be entitled to enforcement) (citing LaSalle, supra). Thus, in this Circuit, petitioner's "sole criminal purpose" defense appears to be valid.

However, the Court is of the opinion that this is a controlling question of law as to which there is a substantial round for difference of opinion, and that an immediate appeal may advance materially the ultimate termination of the litigation.[3] Accordingly, pursuant to its authority under 28 U.S.C. § 3.292(b), this Court grants respondent leave to file an

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[3] of particular concern to this Court is the interpretation the First circuit will give to the Stuart decision.

lnterlocutory appeal. Such appeal must be filed within ten days of the entry of this Order. The remainder of the action, including petitioner's request for an evidentiary hearing, is stayed pending respondent's decision on whether to take an interlocutory appeal and any consideration the First circuit might give this matter.

Accordingly, respondent's motion for a protective order is denied insofar as it is premised upon the "bright line" interpretation of 26 U.S.C. § 7602(b) and § 7602(c). Nonetheless, the Court will not direct respondent to answer the interrogatories at issue until such time as both the instant issue and petitioner's request for an evidentiary hearing are decided. See United States v. Freedom

Church, 613 F.2d 316, 323 1st Cir. 1979) and United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970) (indicating that, upon the required showing, the Court first should hold an evidentiary hearing and then determine whether further exploration, through discovery, seems to be in order)

Motion for Summary Denial of Petition to Quash and for Enforcement of IRS Summons Served Upon Kevin F. Sullivan, Esq.

As noted in section 1 of this Order, consideration of this motion is stayed pending respondent's decision on whether to take an interlocutory appeal of the Court's denial of its motion for a protective order and any decision the First Circuit might render thereon.

3. Conclusion

For the reasons herein stated, respondent's motion for a protective order [document no. 21] is denied. However, respondent need not answer the interrogatories at this time. Respondent's motion for summary denial of the petition to quash and for enforcement of the summons served upon Kevin F. Sullivan, Esq. [(document no. 7] is stayed pending its decision on whether to take an interlocutory appeal and any consideration the First Circuit might give the matter. If respondent does not take an interlocutory appeal, the court clerk is requested to return this file to the Court by Monday September 16, 1991.

SO ORDERED

Norman Stahl [s]
United States District Judge

August 16, 1991

cc: John F. Bielagus, Esq.
Alfred D. Ellis, Esq.
David S. Newman, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

RAYMOND H. COPP, JR.,	)	
	)	91-069-S
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	

O R D E R

In this consolidated civil action, petitioner Raymond H. Copp, Jr. moves to quash eight third-party Internal Revenue Service ("IRS") administrative summonses which seek certain of petitioner's financial records from the years 1985 through 1991.[1] By Order of August 16, 1991, this Court denied respondent's

[1] For a more detailed recitation of the background of this litigation, please see the Court's August 16, 1991, Order.

motion for a protective order, but afforded respondent an opportunity to take an interlocutory appeal of said denial. Of particular interest to the Court was whether petitioner's "sole criminal purpose" defense was still viable in light of the 1982 amendments to 26 U.S.C. § 7602, passed as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"). Though the First Circuit seems to accord the defense continuing vitality despite the 1982 amendments, see United States v. Lawn Builders of New England, Inc., 856 F.2d 388, 391-92 (1st Cir. 1988), such view has come under strong and persuasive attack. See, e.g., United States v. Michaud, 907 F.2d 750, 757 (7th Cir. 1990) (Posner, J., dissenting); La Mura v. United States, 765 F.2d 974, 980

n. 9 (11th Cir. 1985); Pickel v. United States, 746 F.2d 176, 183-84 (3rd Cir. 1984).

Regrettably, respondent has declined to take the appeal and moves this Court to vacate its August 16, 1991, Order. In so doing, respondent again seeks a protective order enabling it to avoid answering certain interrogatories served upon it by petitioner. In response, petitioner seeks an order directing respondent to answer the interrogatories.

A review of pertinent authority from this Circuit reveals that neither request can be granted at this time. Where, as here, petitioner has made a showing

sufficient[2] to pursue a "sole criminal purpose" defense, the Court should

> proceed directly to a hearing at which, if desired, the summonee could examine the agent who issued the summons, concerning his purpose. The court could then, by observation and, where necessary, its own questioning of the agent, make its own determination of whether exploration, as by discovery, seemed to be in order.

United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970) (citation omitted); see also United States v. Freedom Church, 613 F.2d 316, 323 (1st Cir. 1979)

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[2] The Court finds petitioner's allegation that the summonses seek evidence from years outside the scope of petitioner's civil audit, see Petition to Quash at ¶ 8, when coupled with the affidavit submitted by petitioner's counsel, see Exhibit A, attached to Petitioner's Memorandum in Response to Defendant's Motion for Summary Denial of Petition, constitute such "sufficient showing."

(affirming right of summoned party who "evinces an interest in taking advantage of the adversary proceeding to which he is entitled" to an evidentiary hearing). Accordingly, the Court directs the parties to appear for an evidentiary hearing at which petitioner may examine the revenue agent who issued the summonses. The hearing will be held on Wednesday, December 11, 1991, at 10:00 a.m. The Court defers ruling upon all outstanding motions in this matter until after this hearing.

SO ORDERED.

Norman Stahl [s]
United States District Judge

December 3, 1991

cc: John F. Bielagus, Esq.
Alfred D. Ellis, Esq.
David S. Newman, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

Petitioner's Motion to Reconsider and/or to Alter or to Amend the Decision and Order of November 27, 1991

Introduction

This Motion is brought pursuant to Rule 59 of the Federal Rules of Civil Procedure to reconsider and/or to alter or amend the decision and order of November 27, 1991.

In support of this Motion, Petitioner represents as follows:

(1) That by order dated December 3, 1991, the U.S. District Court

of New Hampshire has granted Petitioner, in a parallel case, an evidentiary hearing to pursue a sole criminal purpose defense. Order dated December 3, 1991 (Exhibit "A").

(2) That if this Court agrees to reconsider and/or alter or amend its order and judgment of December 3, 1991, this Court will be empowered to receive and evaluate the findings and conclusions from that evidentiary hearing. In that evidentiary hearing the Petitioner will be able to pursue the sole criminal purpose defense by questioning the Revenue Agent. That course

of action was requested in this case and implicitly rejected by this Court.

(3) That even if this Court does not agree with the findings and conclusions from the New Hampshire Federal District Court, by setting forth in writing its reasoning in support of its determinations, this Court will assist the Appeals Court in determining whether or not the sole criminal purpose defense will be given continuing vitality, i.e., reconciling this difference in holdings between these sister District Courts in the First Circuit.

(4) That Petitioner incorporates the reasons set forth in paragraphs 1-10 from the accompanying Motion to Stay the Enforcement Order and Judgment.

(5) In summary, this Court ought to reconsider its order of November 27, 1991 by allowing the record to be reopened to receive the findings and conclusions from the evidentiary hearing to be held in New Hampshire, and thereafter, setting forth in writing its reasoning on altering or affirming its decision and order of November 27, 1991.

Respectfully submitted for
Petitioner by his attorney,

Alfred D. Ellis, Esquire
CHERWIN & GLICKMAN
One International Place
Boston, MA 02110
Tel. (617) 330-1625

Dated _____

CERTIFICATE OF SERVICE

I, Alfred D. Ellis, hereby certify that on the 6th day of December, 1991, I served a copy of the within Petitioner's Motion to Reconsider and/or to Alter or to Amend the Decision and Order of November 27, 1991 by first-class mail, postage prepaid to David S. Newman, Trial Attorney, Tax Division, U.S. Department of Justice, Post Office Box 55, Ben Franklin Station, Washington, D.C. 20044.

Alfred D. Ellis

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

RAYMOND H. COPP, JR.,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)

AFFIDAVIT OF COUNSEL
FOR PETITIONER

NOW COMES Alfred D. Ellis, attorney for the Petitioner, Raymond H. Copp, Jr. and swears under oath as follows:

(1) That in preparing this affidavit he has reviewed his law firm's time records and file correspondence relating to the Petitioner.

(2) That, he is a member of the bar of the Commonwealth of Massachusetts and the Federal

District Court of Massachusetts.

(3) That he has been allowed to practice in the Federal District of New Hampshire Pro hoc vice for the purposes of all pending Internal Revenue Service quash petitions concerning the Petitioner Raymond H. Copp, Jr.

(4) That on or about February 12, 1991, he submitted his appearance before the Internal Revenue Service on behalf of the Petitioner, Raymond H. Copp, Jr. (see Exhibit "A" attached).

(5) That on or about March 4, 1991, he received a document request

for production of documents due on March 18, 1991 for the taxpayer for tax years 1985, 1986, 1987, 1988 and 1989 from Internal Revenue Service Agent Ernest Van Loan (see Exhibit "B" attached)

(6) That prior to March 4, 1991, all audit request submitted by Revenue officer Van Loan with respect to the petitioner were for Tax Year 1988 - 1040.

(7) That on or about March 15, 1991, by letter he responded to Ernest Van Loan that the taxpayer would be in Boston the week ending March 22, 1991, and that he would discuss the document request with him (see

Exhibit "C" attached hereto and made a part hereof).

(8) That on or about March 29, 1991, he telephoned Revenue officer Ernest Van Loan and told him that he would have his client assemble the documents requested for the open years 1987 and 1989, but the documents requested for the closed years 1985 and 1986 were not readily available. Upon information and belief, the 1988 documents which were assembled over a five month period had already been submitted to Revenue officer Van Loan by Robert Corallino, CPA, under the earlier filed

power of attorney.

(9) That Mr. Van Loan advised the undersigned attorney that he would check with his supervisor as to whether he could accept the documents from the open years.

(10) That on or about April 4, 1991, Mr. Van Loan advised the undersigned attorney that the Internal Revenue Service would only accept all documents from all five years, including the two closed years, and that the Internal Revenue Service was not interested in receiving documents from the remaining two open years.

SWORN TO under pains and penalties of perjury this 10th day of October 1991.

Alfred D. Ellis, Esquire
CHERWIN & GLICKMAN
One International Place
Boston, MA 02110
Tel. (617) 330-1625

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. 1991

Then personally appeared the above named Alfred D. Ellis and acknowledged the foregoing instrument to be his free act and deed, before me.

Notary Public
My commission expires:

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RAYMOND H. COPP, JR., Taxpayer-Petitioner	)	91-11214-N
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

NOTICE OF APPEAL

Notice is hereby given that Raymond H. Copp, Jr., Petitioner above named, hereby appeals to the United States Court of Appeals for the First Circuit from the enforcement order and judgment dated on the 27th day of November, 1991, (see copy attached) and from the denial of the Motion for Reconsideration on December

18, 1991 (conveyed verbally by Judge Mazzone's docket clerk).

Respectfully submitted for Petitioner by his attorney,

Alfred D. Ellis, Esquire
CHERWIN & GLICKMAN
One International Place
Boston, MA 02110
Tel. (617) 330-1625

Dated _____

CERTIFICATE OF SERVICE

I, Alfred D. Ellis, hereby certify that on the ____ day of December, 1991, I served a copy of the within Notice of Appeal by first-class mail, postage prepaid to David S. Newman, Trial Attorney, Tax Division, U.S. Department of Justice, Post Office Box 55, Ben Franklin Station, Washington, D.C. 20044

Alfred D. Ellis

15342.1

Supreme Court, U.S.
FILED
JAN 13 1993
OFFICE OF THE CLERK

No. 92-827

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAYMOND H. COPP, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

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QUESTION PRESENTED

Whether the district court abused its discretion in enforcing an Internal Revenue Service summons without conducting an evidentiary hearing when petitioner failed to offer evidence in support of his allegation that the summons was issued for an improper purpose.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-827

RAYMOND H. COPP, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-37) is reported at 968 F.2d 1435. The order of the district court (Pet. App. A62-A65) enforcing the IRS summons is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1992. The petition for a writ of certiorari was filed on October 13, 1992 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the course of an investigation into the income tax liabilities of petitioner for taxable years 1985 through 1989, Internal Revenue Agent Ernest Van Loan issued a summons to Goldman Sachs & Co., with whom petitioner had engaged in financial transactions (Pet. App. 28). The summons was issued pursuant to 26 U.S.C. 7602 and directed Goldman Sachs & Co. to appear, give testimony and produce documents relevant to the determination of petitioner's tax liabilities for the years in question (Pet. App. 28).

2. Petitioner filed a petition to quash the summons, contending that it was improper for the summons to be served after the IRS had referred the matter to the Justice Department for criminal investigation (Pet. App. 28). Without holding an evidentiary hearing on petitioner's allegations, the district court rejected petitioner's contention. Based upon the uncontradicted affidavit of Internal Revenue Agent Van Loan, the court found that "there is no criminal referral, the summons was issued in good faith to make a correct determination of the [taxpayer's] federal income tax liabilities, if any, for the taxable years under investigation, and all of the required procedures of the Internal Revenue Code have been followed." *Id.* at 33-34.

3. The court of appeals affirmed (Pet. App. 24-37). The court held that petitioner did not establish that the district court committed clear error in finding that the IRS had not abandoned pursuit of petitioner's civil tax liability. Since the IRS is entitled to enforcement of its summons where determination of

civil tax liability is at least one of its purposes, the court upheld the enforcement order (*id.* at 32-34).

The court of appeals also rejected petitioner's argument that the district court abused its discretion in enforcing the summons without conducting an evidentiary hearing (Pet. App. 36 n.1). The court explained that petitioner did not offer any evidence in support of his allegations and thus failed to make a sufficient threshold showing that there was an improper purpose behind the summons (*ibid.*). The fact that a different district court judge, in a proceeding on a different summons, had allowed petitioner to proceed to an evidentiary hearing on the same allegations did not establish that it was an abuse of discretion for the district court to decline to do so in this case (*ibid.*).

ARGUMENT

The court of appeals correctly concluded that the district court did not abuse its discretion in enforcing the summons without conducting an evidentiary hearing. The decision in this case does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Summons enforcement proceedings are designed to be summary in nature. See *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971).[1] While a district court may, in the exercise of its discretion, allow the

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[1] It is well settled that district courts may limit discovery in such proceedings. See *Chen Chi Wang* v. *United States*, 757 F.2d 1000, 1004 (9th Cir. 1985); *United States* v. *Will*, 671 F.2d 963, 967-968 (6th Cir. 1982).

taxpayer an evidentiary hearing to substantiate his allegations and supplement offers of proof that the summons was not issued in good faith, the "right to a[] * * * hearing * * * is not absolute." *Hintze* v. *IRS*, 879 F.2d 121, 126 (4th Cir. 1989). Whether an evidentiary hearing should be conducted in the course of summons enforcement proceedings "is a matter committed to the sound discretion of the district court. There is no requirement that the court conduct such a hearing or permit discovery in each and every case. * * * [A] party challenging IRS summonses will be entitled to an adversary hearing only upon the production of some substantive evidence corroborating the claim of abuse." *Ibid.* See also *Alphin* v. *United States*, 809 F.2d 236, 238 (4th Cir.), cert. denied, 480 U.S. 935 (1987); *United States* v. *Balanced Financial Management, Inc.*, 769 F.2d 1440, 1444 (10th Cir. 1985) (taxpayer must factually refute the government's showing or support a proper affirmative defense before evidentiary hearing is granted); *United States* v. *Tiffany Fine Arts, Inc.*, 718 F.2d 7, 14 (2d Cir. 1983) (only where a taxpayer has made "a 'substantial preliminary showing' " of abuse of process is he entitled to an evidentiary hearing), aff'd, 469 U.S. 310 (1985); *United States* v. *Kis*, 658 F.2d 526, 539 n.39 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) ("This hearing is not, however, automatic. * * * [T]he taxpayer must make some threshold showing to be entitled to the hearing."); *United States* v. *National Bank*, 622 F.2d 365, 367 (8th Cir. 1980) ("An evidentiary hearing is necessary only where substantial deficiencies in the

summons proceedings are raised by the party challenging the summons.").

Petitioner's reliance (Pet. 18-19) on the Third Circuit's opinion in *United States* v. *McCarthy*, 514 F.2d 368 (1975), is misplaced. In *McCarthy*, the court explained that "not every summons enforcement proceeding will require an evidentiary hearing * * * [and] if the person summoned neither puts in issue allegations of the complaint nor raises proper affirmative defenses, no evidentiary hearing will be required; the matter can be decided on the pleadings." *Id.* at 373. Although the Third Circuit afforded the taxpayer an evidentiary hearing in *McCarthy*, it did so only after concluding that the allegations raised "the possibility that the IRS agents charged with the investigation of defendant-corporation had no intention of pursuing any civil remedies as to bring into question their good faith" and the "defendant's allegations sufficiently raised the possibility that enforcement of the summons would result in a [prohibited] second inspection." *Id.* at 375-376. By contrast, the district court in this case, after reviewing an uncontroverted affidavit signed by the Internal Revenue Agent in charge of the investigation, specifically found that "there is no criminal referral, the summons was issued in good faith to make a correct determination of the [taxpayer's] federal income tax liabilities, if any, for the taxable years under investigation, and all of the required procedures of the Internal Revenue Code have been followed" (Pet. App. 33-34). Since petitioner failed to offer any evidence to contradict that affidavit, there was no

need for a hearing even under the test described by the Third Circuit in the *McCarthy* case.

Petitioner's reliance (Pet. 20-21) on the Sixth Circuit's decision in *United States* v. *Will*, 671 F.2d 963 (1982), is also misplaced. In *Will*, the court explained that "defining the permissible scope of the hearing is a decision left to the discretion of the district court * * * [and if the] court concludes that it cannot fairly decide the case on the evidence before it, the court is free to direct such further proceedings as its discretion dictates; conversely, if the evidence is sufficient, no further hearing is needed." *Id.* at 968 (citing *United States* v. *McCarthy*, *supra*). In the present case, the district court properly concluded that it could fairly decide the case on the basis of the government's affidavit and that no other relevant proof had been offered to warrant an evidentiary hearing.[2]

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[2] Even if (contrary to fact) the IRS had been seeking information for a criminal purpose, the 1982 amendments to Section 7602 of the Code would entitle the IRS to enforcement of the summons under such circumstances. See, *e.g.*, *United States* v. *Abrahams*, 905 F.2d 1276, 1280-1281 n.4 (9th Cir. 1990) (although the "civil/criminal distinction was once critical, * * * [t]he 1982 enactment of § 7602(b) * * * broadened the summons power to include 'any offense connected with the tax laws' and thereby rendered the distinction irrelevant"); *La Mura* v. *United States*, 765 F.2d 974, 980 n.9 (11th Cir. 1985) ("Congress amended the tax code to provide a clear definition of when a tax investigation has become solely criminal in nature."); *United States* v. *G. & G. Advertising Co.*, 762 F.2d 632, 634 n.1 (8th Cir. 1985) ("The requirement that the summons not issue for a solely criminal investigation * * * has been negated by the 1982 amendment to § 7602(b) which allows inquiry into 'any offense,' so long as the case has not been

2. District court decisions to enforce a summons without a hearing are reviewable under the abuse of discretion standard. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 324 n.7 (1985); *United States* v. *Samuels, Kramer & Co.*, 712 F.2d 1342, 1348 (9th Cir. 1983); *United States* v. *Southeast First National Bank, Inc.*, 655 F.2d 661, 668 (5th Cir. 1981); *United States* v. *Harris*, 628 F.2d 875, 883-884 (5th Cir. 1980); *United States* v. *Wright Motor Co.*, 536 F.2d 1090, 1094 & n.1 (5th Cir. 1976). "In order to have an 'abuse' [of discretion] in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Ibid.* (quoting *Spalding* v. *Spalding*, 94 N.W.2d 810, 811 (Mich. 1959)).

Petitioner failed to offer any evidence of deficiencies in the summons process. Nevertheless, he maintains that he was entitled to an evidentiary hearing so that he could show that the IRS issued the summons solely to pursue a criminal investigation, and that it should therefore be quashed. In support of this argument petitioner alleges (Pet. 13) that several facts—including the alleged expansion of the audit to include taxable years outside of 1988 and the refusal of the IRS conditionally to accept a portion of requested additional documents—constitute evidence

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turned over to the Justice Department."); *Moutevelis v. United States*, 727 F.2d 313, 314-315 (3d Cir. 1984) (same). Because of their alternative disposition of this case, the courts below did not need to, and did not, reach that issue here. Cf. *United States* v. *Michaud*, 907 F.2d 750, 752 n.2 (7th Cir. 1990).

of an improper purpose on the part of the IRS. This contention is baseless. As the court of appeals correctly explained, petitioner "has not * * * demonstrated how these facts, none of which are inconsistent with a civil audit, suggest an improper purpose" (Pet. App. 35).

There is no requirement that an evidentiary hearing be held when a taxpayer does not "develop facts from which a court might *infer a possibility* of some wrongful conduct by the Government." *United States* v. *Kis*, 658 F.2d at 540. The courts below correctly concluded that petitioner failed to meet that requirement in this case. The district court thus did not abuse its discretion in disposing of this case without an evidentiary hearing. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. at 324 n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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